

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ZYRONE LEE SANDERS,

Defendant-Appellant.

UNPUBLISHED

January 26, 2012

No. 301065

Kalamazoo Circuit Court

LC No. 2009-001668-FH

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree fleeing and eluding a police officer, MCL 257.602a(4); resisting, obstructing, opposing, or endangering a police officer, MCL 750.81d(1); and possession of a controlled substance, marijuana, MCL 333.7403(2)(d). He was sentenced as a habitual offender, fourth offense, MCL 769.12, to 5 to 30 years' imprisonment for second-degree fleeing and eluding a police officer, 3 to 15 years' imprisonment for resisting, obstructing, opposing, or endangering a police officer, and one to two years' imprisonment for possession of a controlled substance, marijuana, second offense, MCL 333.7413(2). Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm.

I. FACTS

On October 29, 2009, Officer Kyle Doster with the Portage Police Department was driving a fully marked police car in Portage, Michigan. As Doster drove up behind a Mercury Cougar with a license plate that appeared to be expired or almost expired. Doster checked the Cougar's license plate number against the information for the plate from the Michigan Secretary of State's office and discovered that the license plate was registered to a different car. Doster turned on his overhead lights to make a traffic stop, however, the driver of the Cougar did not stop but instead drove through a series of parking lots, and then accelerated away from Doster on side streets. The driver of the Cougar was traveling at approximately 54 to 55 miles per hour on streets with speed limits of 25 to 35 miles per hour. While Doster followed the Cougar he was able to see that the driver was an African-American male wearing a baseball cap. Doster was also able to see the back of the driver's head and in the Cougar's rearview mirror he could see the driver's eyes and a partial profile of the driver's head.

At around 9:00 p.m., the driver finally stopped the vehicle in a parking lot outside an apartment building. Though it was dark outside, Doster testified that the parking lot was well lit. In order to see better, Doster testified that he used his car's headlights, spotlight, and light emitting diode (LED) lights. Additionally, there were lamp posts in the parking lot that lit the parking area and lights were on in the nearby apartments. According to Doster, the driver got out of the Cougar and Doster was able to see the driver in profile from both sides. The driver also looked back at Doster, giving Doster a view of the front of the driver's face. Doster testified that he saw the front of the driver's face for less than a second from 20 yards away. However, Doster stated that as a police officer, he was trained in remembering details that he only saw briefly. When the driver got out of the Cougar, Doster was focused on the driver's features and trying to remember them.

After getting out of the Cougar, the driver ran behind an apartment building. Doster chased the driver, and yelled at him to stop. The driver did not stop and Doster lost him in the shadows behind the apartment building. Based on his observation of the driver, Doster broadcasted a description of the driver over police radio as "a black male, very short hair, wearing a smooth black leather jacket and jeans" and that the driver was wearing glasses.

Doster returned to the Cougar and searched for evidence concerning the driver's identity. Doster found court documents with defendant's name and DVDs rented from a Blockbuster Video store which the manager of the Blockbuster confirmed were rented to defendant's account. Additionally, Doster found a jar with green leafy materials inside the Cougar. One fingerprint was lifted off of the jar which was matched to defendant's right index finger. The green leafy materials inside the jar were tested and confirmed to be 18.44 grams of marijuana. Based on what he found in the Cougar, Doster requested defendant's information and photograph from the Michigan Secretary of State database, and between one to several hours following the incident¹ Doster received defendant's photograph from the Secretary of State. Doster recognized defendant as the driver. When asked how he recognized defendant as the driver, Doster responded: "[t]he subject had the same physical features as the subject that had exited the vehicle and ran from me. There's a lot of similarities; hairstyle, the glasses being worn looked to be the same, just same basic dimensions and features." Doster also identified defendant in court as the driver of the Cougar.

Defendant moved the trial court to suppress Doster's identification of defendant. Defendant argued that the sole photograph that Doster looked at before identifying defendant was unduly suggestive. The trial court denied the motion. Defendant was subsequently tried and convicted as stated above.

Defendant first argues that the trial court erred in admitting Officer Kyle Doster's identification of defendant because Doster's use of a single secretary of state photograph was impermissibly suggestive. The trial court's decision to admit identification evidence will not be

¹ In the motion hearing to suppress the identification, Doster said that he viewed the Secretary of State photo "at least an hour" after the incident. At trial, Doster said that he viewed the photograph several hours after the incident.

reversed unless it is clearly erroneous. *People v Kurylczuk*, 443 Mich 289, 303; 505 NW2d 528 (1993). “A photographic identification procedure violates a defendant’s right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification.” *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998), citing *Simmons v United States*, 390 US 377, 384; 88 S Ct 967; 19 L Ed 2d 1247 (1968). Here, Doster viewed a single photograph of defendant in making his identification. The exhibition of a single photograph “is one of the most suggestive photographic identification procedures that can be used.” *Gray*, 457 Mich at 111, quoting Sobel, *Eyewitness Identification* (2d ed), § 5.3(f), p 5-42.

Despite the identification’s suggestiveness, an “in-court identification by the same witness still may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure.” *Kurylczuk*, 443 Mich at 303. In *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977), the Michigan Supreme Court listed eight factors that a court should use in determining if an independent basis exists: a prior relationship with or knowledge of the defendant, the opportunity to observe the offense, the length of time between the offense and the disputed identification, accuracy or discrepancies in the pre-lineup or show-up description and defendant’s actual description, any previous proper identification or failure to identify the defendant, any identification prior to lineup or showup of another person as defendant, the nature of the alleged offense and the physical and psychological state of the victim, and any idiosyncratic or special features of defendant.

Our review of the record leads us to conclude that there existed a sufficient independent basis for the in-court identification. Doster had no prior relationship with or knowledge of defendant. However, Doster had an opportunity to observe the offense. Before the stop, Doster was able to see through the driver’s rear windshield that the driver was an African-American male wearing a baseball cap. In the driver’s rearview mirror, Doster could see the driver’s eyes and a partial profile of the driver’s head. When the driver finally stopped, it was 9:00 p.m. and dark outside. However, the parking lot was well-lit by Doster’s car, lamp posts, and the light of nearby apartments. When the driver got out of the car, Doster was able to see the driver’s face from 20 yards. Although the observation was for less than a second, Doster described the driver as “a black male, very short hair, wearing a smooth black leather jacket and jeans” and wearing glasses. This description was consistent with defendant’s secretary of state photograph. In regards to the nature of the alleged offense and the physical and psychological state of the “victim”, we have recognized that “a police officer, . . . is a trained observer [and is] ‘not likely to have been affected adversely by the stress inherent in the situation.’” *People v McCray*, 245 Mich App 631, 639-641; 630 NW2d 633 (2001), quoting *People v Starks*, 107 Mich App 377, 382; 309 NW2d 556 (1981). Doster was a police officer focused on observing and remembering his encounter with the driver. The facts support an independent basis for Doster’s in-court identification of defendant. Therefore we conclude that the trial court’s decision denying defendant’s motion to suppress was not clearly erroneous.

Defendant next argues there was insufficient evidence of his identity as the driver. We review a challenge to the sufficiency of the evidence in a jury trial de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found

that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

On appeal, identity is the only element challenged by defendant. The element of identity is always an essential element in a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). As previously stated, Doster was able to describe the driver as “a black male, very short hair, wearing a smooth black leather jacket and jeans” and wearing glasses based on his observations of the driver. At trial, Doster was able to identify defendant as the driver. An identification by a witness may be sufficient to support a conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Defendant’s assertion that Doster’s identification was insufficient evidence because of his brief opportunity to see the driver’s face addresses the credibility of Doster’s identification. Such credibility of identification witness testimony is a question for the trier of fact that we will not resolve anew. *Davis*, 241 Mich App 700 quoting *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992), *aff’d* on other grounds, 445 Mich 369; 518 NW2d 418 (1994).

In addition to the identification testimony, the prosecution offered circumstantial evidence of defendant’s identity as the driver. The car contained DVDs rented out to defendant’s Blockbuster account and a jar of marijuana upon which defendant’s right index fingerprint was imprinted. Circumstantial evidence may be sufficient to prove identity. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999). Thus, the circumstantial and identification evidence, viewed in a light most favorable to the prosecution, would allow a rational juror to find that the essential elements of identity was proven beyond a reasonable doubt for all offenses.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Stephen L. Borrello